

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN FULLER,

Plaintiff,

Case No. 10-12200

v.

Honorable Patrick J. Duggan

CITY OF DEARBORN, MADOU BAZZI,
STEVEN FAITH, HAYES, and TIMOTHY
McHALE in their individual and official
capacities,

Defendants.

ORDER

At a session of said Court, held in the U.S.
District Courthouse, Eastern District
of Michigan, on May 3, 2011.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On June 3, 2010, Kevin Fuller ("Plaintiff") filed this action to recover damages for injuries incurred during his arrest by Dearborn Police officers. Before the Court is Defendants' motion to dismiss, filed on March 1, 2011 pursuant to Federal Rule of Civil Procedure 37(d). The Court dispenses with oral argument pursuant to Eastern District of Michigan Local Rule 7.1(f), and for the reasons stated below, grants Defendants' motion.

Plaintiff was arrested by Dearborn Police officers on June 6, 2008. He alleges that the defendant officers use their TASER weapons on him and repeatedly punched and kicked him while he was incapacitated on the ground. Compl. ¶¶ 14-15. Plaintiff filed this suit in the

Eastern District of Michigan, asserting claims of excessive force, in violation of the Fourth and Fourteenth Amendments to the United States Constitution (Counts I and II); assault and battery (Count III); and gross negligence (Count IV).

On October 13, 2010, Plaintiff's counsel moved to withdraw from this action, asserting that Plaintiff had repeatedly failed to communicate with his attorneys or respond to correspondence sent to him. Plaintiff's counsel stated that they had made numerous unsuccessful attempts by telephone and in writing to communicate with Plaintiff. After a hearing held on October 28, 2010, the Court granted the motion to withdraw and stayed the proceedings in this case for ninety days to allow Plaintiff to obtain substitute counsel. Plaintiff's counsel mailed a copy of the Court's order to Plaintiff's last two known addresses. Plaintiff did not respond, nor has he provided the Court with an updated mailing address.

Plaintiff's deposition was scheduled for February 24, 2011, and notice was mailed to Plaintiff's last two known addresses on February 9, 2011. The notice was returned as undeliverable. *See* Defs.' Br. Supp. Mot. Dismiss Ex. B. Plaintiff subsequently failed to appear for his deposition. Defendants have responded by filing their motion to dismiss.

The Court may order sanctions if a party, after proper notice, fails to appear for his deposition. Fed. R. Civ. P. 37(d). "Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." Fed. R. Civ. P. 37(d)(3). This includes "dismissing the action or proceeding in whole or in part." Fed. R. Civ. P. 37(b)(2)(A)(v). "The court must require the party failing to act . . . to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3).

Defendants made a good faith effort to serve notice of Plaintiff's deposition, mailing it to each of his two last known addresses. The Court further notes that the Scheduling Order mailed to Plaintiff was also returned as undeliverable, and Plaintiff has not provided the Court with an updated mailing address. Plaintiff did not appear at his deposition, preventing Defendants from obtaining the discovery required to adequately defend this suit. In light of Plaintiff's failure to respond to correspondence from his counsel, Defendants, and the Court, dismissal of this action is appropriate. Defendants request an award of costs and attorney's fees, and the Court can see no reason that such an award would be unjust under these circumstances.

Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss is **GRANTED**;

IT IS FURTHER ORDERED that Defendants are awarded reasonable costs and attorney's fees, and directed to submit a statement of these expenses pursuant to Eastern District of Michigan Local Rule 54.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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